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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1015 OF 2018**

Nirmala Kanjibhai Jadhav and Ors. Petitioners.
V/s
Mrs. Sarita Jayprakash Pathak and Ors. Respondents.

**ALONGWITH
INTERIM APPLICATION NO.30589 OF 2018
IN
WRIT PETITION NO.1015 OF 2018**

Guruprasad Sachidanand Mishra Applicant/
(Original Defendant No.3)

In the matter between

Nirmala Kanjibhai Jadhav and Ors. Petitioners.
V/s
Mrs. Sarita Jayprakash Pathak and Ors. Respondents.

Mr. Ghanshyam Upadhyay i/b Law Juris for the Petitioners.
Mr. Aloukik R. Pai @ Manasi R. Gupta @ Atharva Sane i/b S. Joshi for
Respondent Nos. 1 to 4.

CORAM: NITIN W. SAMBRE, J.

DATE: AUGUST 08, 2023

P.C.:-

1] Heard Mr. Upadhyay, learned Counsel for the Petitioners and Mr.
Pai, learned Counsel for Respondent Nos. 1 to 4.

2] Challenge in the present Writ Petition is to the order dated 5th

October, 2015 passed in Marji Application No.292 of 2014 and order dated 19th November, 2016 passed in Misc. Appeal No.76 of 2015.

3] Facts necessary for deciding present Writ Petition are as under:-

4] Respondents initiated R.A.E. Suit of 514/957 on 25th October, 2010 against present Petitioners/Defendants for recovery of possession of Shop No.4 in Chawl No.1, Shantadevi Sacchidand Mishra Chawl also known as Yoagmamy Chawl, Hanuman Nagar, Kurar Village, Malad (East), Mumbai-400 097 and mesne profit on the grounds of arrears of rent and bonafide requirement.

5] It is the case of Respondents that they are landlords of the suit premises and deceased Kanjibhai Jadhav was original tenant. It is claimed in the suit that present Petitioners/Defendants were in arrears of rent being legal heirs of Kanjibhai, carried illegal additions and alterations to the suit premises by encroaching upon the open space, thereby constructing new structure/partition in the suit premises causing waste and damage to the suit premises and as such committed breach of terms and conditions of tenancy. It is also claimed that suit

premises were sublet and same are required for bonafide need.

6] Petitioners/Defendants contested the suit claim by filing Written Statement at Exhibit-8 and have admitted landlord-tenant relationship. Having regard to resistance shown by the Defendants, Trial Court framed following issues and recorded its findings:-

<u>Issues</u>	<u>Findings</u>
1] Whether defendants prove that suit for eviction on the ground of arrears of rent is not maintainable for want of notice under Section 15(2) of the Maharashtra Rent Control Act?	In the affirmative.
2] Whether plaintiff proves that defendants are in arrears of rent from 01.03.2004 till 30.09.2010 at the rate of Rs 100/- per month?	In the affirmative.
3] Whether plaintiff proves that defendants are not ready and willing to pay the rent and permitted increases?	In the affirmative.
4] Whether plaintiff proves that defendants have carried out additions and alterations of permanent nature in the suit premises without consent in writing of the plaintiff?	In the affirmative.
5] Whether plaintiff proves that defendants have caused waste and damage to the suit premises?	In the affirmative.
6] Whether plaintiff proves that defendants have unlawfully sublet the suit premises and parted with the possession to Mr. Ganesh and they are earning the profits?	In the affirmative.
7] Whether plaintiff proves that she requires the suit premises reasonably and bona fide for her personal use and occupation?	In the affirmative.
8] To whom, the greater hardship would be caused in case of passing the decree than by refusing to pass it ?	To the plaintiff.

9] Whether plaintiff is entitled to recover possession of the suit premises?	In the affirmative.
10] Whether plaintiff is entitled to future mesne profits?	In the affirmative.
11] What order and decree?	As per final order

7] Present Petitioners/Defendants alleged that on 01.09.2014, suit was decreed ex-parte and therefore they had taken out Marji Application No.292 of 2014 under Order 9 Rule 13 of the Civil Procedure Code with the following prayers:-

“a) The delay if any in filing the above application may be condoned.

b) The exparte decree dated 1st September 2014 passed in the above suit be set aside and the above suit may be heard on merits.

c) Pending the hearing and final disposal of the above application the stay granted to the execution of the decree dated 1st September 2014 passed by this Hon’ble Court in Execution Proceedings Application No.96 of 2014 be continued.

d) The Execution Proceedings Application No. 96 of 2014 and the above application for setting aside exparte decree may be heard and decided together.

e) Such other and further reliefs may be granted as this Hon'ble Court may deem fit and proper"

8] The said Marji Application came to be rejected vide reasoned order dated 05.10.2015 with a finding that aforesaid Marji Proceedings were taken out at belated stage and since delay was not explained, Court below refused to condone the delay. Court below further observed that Petitioners have failed to demonstrate absence of sufficient cause which prevented them from appearing in the aforesaid suit.

9] Petitioners, feeling aggrieved, preferred an Appeal being Misc. Appeal No.76 of 2015 before Appellate Bench of the Small Causes Court on 31.10.2015 which was also dismissed on 19.11.2016. As such, this Petition.

10] Mr. Upadhyay, Counsel appearing for the Petitioners would urge that this Court is required to be sensitive to the following dates (a)suit came to be initiated on 27.10.2010, (b) Written Statement-Exhibit-8

came to be placed on record on 22.12.2010, (c) issues were framed on 09/08/2011, (d) parties remained absent and the suit was posted for dismissal on 08.09.2011, (e) copy of affidavit of examination-in-chief of the Plaintiff was received by Counsel for original Defendant on 23.02.2012. Decree (alleging ex-parte) came to be passed on 01.09.2014. Since the bailiff visited suit premises, Petitioners/Defendants came to know about ex-parte decree on 15.11.2014. Petitioners applied for certified copy of the said judgment and decree on 22.11.2014 which was received on 25.11.2014 and Marji Proceedings for setting aside ex-parte decree came to be initiated on 28.11.2014.

As such, according to Mr. Upadhyay, Petitioners got knowledge of the decree in question on 15.11.2014 and immediately on 22.11.2014, Petitioners applied for certified copy. Since certified copy was received on 25.11.2014 and Marji Proceedings for setting aside ex-parte decree were initiated within 30 days i.e. on 28.11.2014 from the date of knowledge i.e. 15.11.2014, there is no delay in preferring the Application. He would further urge that assuming without admitting that there is delay still in the proceedings taken out by the

Petitioners, a specific prayer was made for condonation of delay, as could be noticed from the prayer clause in the Marji Application. He would further claim that fact about the suit being posted for dismissal on 08.09.2011 has prompted the Counsel for the Petitioners, so also Petitioners not to appear in the suit. According to him, lawyer of the Petitioners never intimated the Petitioners about filing of the affidavit of examination-in-chief. In this background, he would claim that once the suit was posted for dismissal, it was a natural conduct of the Petitioners not to attend the proceedings. According to him, Petitioners/Defendants are not required to appear in the matter, as the Petitioners were under presumption that on the next date, suit will be dismissed.

According to him, default of the lawyer of the Petitioners/Defendants to communicate receipt of copy of the examination-in-chief of the Plaintiff and not acting on the same by giving intimation to the Petitioners/Defendants should be viewed as failure of the lawyer to discharge his professional duties. That being so ex-parte decree ought to have been set aside. According to Mr. Upadhyay, since the decree of eviction is passed on 01.09.2014

without affording reasonable opportunity of defending the case to the Petitioners and since the Petitioners were unable to lead evidence or cross-examine the witnesses of the Plaintiffs this Court not only should condone the delay but also set aside decree passed by the Trial Court with a direction to decide the suit claim afresh after affording opportunity of hearing to the Petitioners.

11] In addition to above, Mr. Upadhyay has invited my attention to various judgments of the Apex Court and other Courts, particularly in the matter of *Collector, Land Acquisition Anantnag and Another vs. Katiji & Ors.*, reported in (1987) 2 SCC 107 pointing out para 3, so as to claim that Court while dealing with the prayer for condonation of delay should apply law in meaningful manner which sub-serves the ends of justice. According to him, Court should take liberal approach in the matter of condonation of delay when substantial right of the party is under adjudication. He would as such claim that it is not necessary that every day's delay must be explained as long as Petitioners are able to demonstrate that absence of communication between them and lawyer prompted them not to appear in the matter. According to him, justice oriented approach ought to have been taken

by the courts below in the matter of condonation of delay. He would claim that Petition needs to be allowed not only by setting aside impugned order but also by setting aside ex parte decree, or else this Court should set aside dismissal of prayer of condonation of delay and direct the Court below to decide the prayer for setting aside ex-parte decree afresh.

12] He would also draw support from the judgment of the Apex Court in the matter of *Rafiq and Another vs. Munshilal and Another* reported in (1981) 2 SCC 788, so as to claim that parties like Petitioners should not be made to suffer for default of lawyer in communicating progress in the suit. He has also relied upon the Judgment of the Apex Court in the matter of *M.K. Prasad vs. P. Arumugam* reported in (2001) 6 SCC 176, so as to claim that Respondents-decree holders can be compensated by putting the Petitioners to reasonable condition of payment of costs, thereby ordering condonation of delay and setting aside ex-parte decree. Counsel for the Petitioner would further urge that delay is only of 57 days and as such same needs to be condoned in the backdrop of the aforesaid submissions.

13] While countering aforesaid submissions, Counsel for the Respondents/Plaintiffs would urge that according to him, proceedings are contested by the Petitioners on merit, so also on the issue of prayer for condonation of delay. According to him, suit of the Respondents/Plaintiffs-decree holders for eviction was decreed on 01.09.2014. Suit was duly contested by the Petitioners/Defendants by filing Written Statement at Exhibit-8. According to him, once it is demonstrated that copy of affidavit of examination-in-chief was received by the Petitioners through their Advocate and the Written Statement was already on record which led to framing of issues based on resistance shown by the Petitioners in Written Statement-Exhibit-8, order decreeing the suit on 01.09.2014 cannot be said to be an ex-parte order or ex-parte decree. According to Mr. Pai, the Apex Court in the matter of *Sangram Singh vs. Election Tribunal Kotah* reported in **AIR 1955 SC 425** has already held in paras 32, 34 and 35 that in the absence of there being an order to proceed with the suit ex-parte, it cannot be termed that the suit was decided ex-parte. He would further claim that the fact that Written Statement-Exhibit-8 was on record and issues were framed thereafter, sufficiently speaks of the

resistance by the Petitioners. Mr. Pai, Counsel for the Respondents/decreed holders would urge that Petitioners have created situation by not attending the court proceedings before the Court below and are trying to take advantage of it so as to defeat the object of decree. In the aforesaid backdrop, he would claim that very Marji Application taken out by the Petitioners for condonation of delay and setting aside alleged ex-parte decree itself is not maintainable. Drawing support from the observations in the impugned judgment, he would claim that Petitioners have taken a chance by contesting the proceedings not only on the issue of condonation of delay but also on merit, as could be inferred from the prayer clause in the Marji Application and contentions advanced by them have been considered by both the courts below while passing the impugned orders. According to Mr. Pai, Petitioners have made false statement and as such both the Courts by relying on the judgment in the matter of *Taramati Bhagwandas Vithlani vs. Navjivan Gulab Gaikwad & Ors.*, reported in **2006(4) Bom.C.R. 565** has recorded finding of improper conduct of the Petitioners. In this backdrop, he would urge that Petition is liable to be dismissed.

14] I have appreciated rival submissions.

15] At the outset, this Court is required to consider as to whether very decree passed on 01.09.2014 can be termed as ex-parte decree as is claimed in the Marji Proceedings taken out by the Petitioners/Defendants. Fact remains that after suit summons was served on the Petitioners/Defendants, they appeared and also contested the claim by placing on record Written Statement-Exhibit-8. Thereafter issues were framed and Petitioners' lawyer continued to appear in the matter on their behalf. It is an admitted position on record that Petitioners were served with affidavit of examination-in-chief of P.W.1. In such an eventuality, it cannot be said that the Small Causes Court proceeded ex-parte against the Petitioners.

16] If we appreciate the contention of Mr. Upadhyay that decree passed is an ex-parte decree, same is required to be tested in the light of the provisions of Order 9 Rule 6. Clause (a) of Rule 6 of Order 9 provides that, if the summons is duly served and the Defendant does not appear then order can be made that suit be heard ex-parte. In the case in hand, fact remains that suit summons was duly served on the

Petitioners. They have placed their appearance, contested the claim by filing Written Statement-Exhibit-8 and thereafter received copy of the affidavit in examination-in-chief of Plaintiff. In such eventuality, it cannot be said that the suit proceeded ex-parte against the Petitioners. In this backdrop, once it is observed that the suit has not proceeded ex-parte against the present Petitioners/Defendants, proceedings for setting aside such decree by styling the same to be ex-parte one under the provisions of Order 9 Rule 13 itself are not maintainable. Counsel for the Respondents/Plaintiffs has thus rightly relied on the judgment of the Apex Court in the matter of *Sangram Singh*, cited supra.

17] Under Order 17 Rule 1, Court can grant time and adjourn the hearing if sufficient cause is shown and at times such adjournment shall be subject to payment of costs.

Rule 2 of Order 17 provides for procedure to be adopted if parties fail to appear on the day fixed. Said Rule provides that on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such

other order as it thinks fit. Explanation to Rule 2 provides that, where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present. The Apex Court in the aforesaid backdrop had an occasion to consider provisions of Order 17 Explanation to Rule 2 and Order 9 Rule 13 in the matter of *B. Janakiramaiah Chetty vs. A. K. Parthasarthi and others*, reported in **AIR 2003 SC 3527**. In paras 12 and 13 of the said judgment, Apex Court has observed thus :

“**12.** In an instant case, the judgment of the Court was in the following terms :

“Suit for recovery of a sum of Rs 10,00,000/- being the damages caused on account of arrears and detention illegally by the defendants on 18-4-1989 and for costs.

After filing of written statement by the defendant the following issues were settled for trial :

1. Whether on 18-4-1989 at 10.00 a.m. the 1st defendant and his staff whisked away the plaintiff in a high handed manner, while he was in his shop?

2. Whether the plaintiff was tortured by Ist and 2nd defendants?

3. Whether the learned Advocate

Commissioner, Chittor found the plaintiff in Bhagyam P. S.?

4. Whether Ist defendant denied the quality of changes and courts of A.P.?

5. Whether the plaintiff is entitled for damages as prayed for?

6. To what relief?

Additional issues reframed on 1-12-1997:

1. Whether this Court has no jurisdiction to try this suit?

2. To what relief?

D.1 to D.3 called absent. No representation for the defendants. Suit is decreed with costs, together with interest at 6% per annum from the date of suit till realization.”

“13. This clearly has imprints of an ex parte adjudication and not of a decision on merits. There is not even any indication as to what evidence was evaluated and/or whether the merits were tested.”

18] If we appreciate the submissions of Counsel for the Petitioners, what can be noticed from very conduct of the Petitioners of remaining absent is, after Respondents/Plaintiffs submitted their affidavit of examination-in-chief, the Court proceeded to grant further adjournment for production of documents. The Court thereafter evaluated evidence of Respondents/Plaintiffs and as the

Petitioners/Defendants have neither led their evidence nor cross-examined the Plaintiffs' witness, proceeded to decide the suit of the Respondents/Plaintiffs on merit. As such, Petitioners claim that remedy under Order 9 Rule 13 is available by treating the decree of eviction as an ex-parte decree cannot be accepted

19] This takes me to the next contention of Mr. Upadhyay that the suit was posted for dismissal on 15/10/2011 and as such Petitioners/Defendants have failed to appear, as they were under the impression that suit was going to be dismissed. Fact remains that subsequent thereto, Advocate of the Petitioners has collected copy of affidavit of examination-in-chief and the Petitioners remained absent in the said proceedings. This very fact in categorical terms establishes that it was the Petitioners who remained absent in the suit proceedings and are blaming their lawyer for suffering decree in question. This Court has already held that decree in question cannot be termed as ex-parte decree under Order 9 Rule 6 of Civil Procedure Code. Petitioners/Defendants have participated in the proceedings through their Written Statement and have also received copy of the

affidavit of examination-in-chief of the Respondents/Plaintiffs. That being so, in the absence of evidence to the contrary viz. notice having not been issued to the lawyer by the Petitioners for failing in discharge of his professional duties, contention of the Counsel for the Petitioners that it is because of failure of their lawyer, Petitioners/Defendants suffered ex-parte decree cannot be accepted. It has become a routine practice adopted by parties like Petitioners to blame their own lawyers for ex-parte decree/order so as to create artificial legal ground.

20] In this backdrop, I am of the view that no interference is called for in the impugned orders as the orders are in tune with the provisions of law. Petition stands dismissed. As a consequence, Interim Application also stands disposed of.

[NITIN W. SAMBRE, J.]